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18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA
20
21 SAN FRANCISCO DIVISION

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15 **HECTOR HERNANDEZ,**
16 Petitioner,
17 v.
18 **ARNOLD SCHWARZENEGGER, Governor,**
19 Respondent.

C07-3427 PJH

**ANSWER TO THE ORDER
TO SHOW CAUSE;
MEMORANDUM OF POINTS
AND AUTHORITIES**

Judge: The Honorable
Phyllis J. Hamilton

1 TABLE OF CONTENTS
2

	Page
3 INTRODUCTION	1
4 ANSWER TO THE ORDER TO SHOW CAUSE	2
5 MEMORANDUM OF POINTS AND AUTHORITIES	10
6 ARGUMENT	10
7 I. THE STATE COURT'S DENIAL OF PETITIONER'S HABEAS	
8 CLAIM WAS NOT CONTRARY TO OR AN UNREASONABLE	
9 APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW,	
10 NOR BASED ON AN UNREASONABLE DETERMINATION	
11 OF THE FACTS.	10
12 A. The State Court Decision Was Not Contrary to or an Unreasonable	
13 Interpretation of Clearly Established Federal Law.	11
14 1. Petitioner received all process due under the only United States	
15 Supreme Court law addressing due process in the parole context.	11
16 2. The Ninth Circuit's some-evidence test is not clearly established	
17 Supreme Court law, and thus not applicable to Petitioner's	
18 federal habeas corpus claims under AEDPA.	12
19 3. Even if the some-evidence standard was clearly established federal	
20 law, the standard was correctly applied by the state courts.	15
21 4. The Governor may rely on static factors to deny parole.	17
22 B. The Reasoned State Court Decision Upholding the Board's Parole Denial	
23 Was a Reasonable Interpretation of the Facts.	19
24 CONCLUSION	21
25	
26	
27	
28	

1 TABLE OF AUTHORITIES
2

		Page
3	Cases	
4		
5	<i>Biggs v. Terhune</i> 334 F.3d 910 (9 th Cir. 2003)	18
6	<i>Benny v. U.S. Parole Comm'n</i> 295 F.3d 977 (9th Cir. 2002)	9
7	<i>Carey v. Musladin</i> — U.S. — 127 S. Ct. 649 (2006)	8, 12-15
8		
9	<i>Crater v. Galaza</i> — F.3d —, 2007 WL 1965122, *2 (9th Cir. July 9, 2007)	13, 14
10		
11	<i>Foote v. Del Papa</i> — F.3d — 2007 WL 1892862 (9th Cir. July 3, 2007)	13, 14
12	<i>Greenholtz v. Inmates of Neb. Pen. & Corr. Complex</i> 442 U.S. 1 (1979)	8, 11, 15, 18
13		
14	<i>Hernandez v. Small</i> 282 F.3d 1132 (9th Cir. 2002)	16
15		
16	<i>In re Capistran</i> 107 Cal. App. 4th 1299 (2003)	9
17	<i>In re Dannenberg</i> 34 Cal. 4th 1061 (2005)	8
18		
19	<i>In re Honest</i> 130 Cal. App. 3d 81 (2005)	21
20	<i>In re Rosenkrantz</i> 29 Cal. 4th 616 (2002)	9, 15
21		
22	<i>Irons v. Carey</i> — F.3d —, 2007 WL 2027359 (9th Cir. July 13, 2007)	9
23	<i>Irons v. Carey</i> 479 F.3d 658 (9th Cir. 2007)	18
24		
25	<i>Jancsek v. Oregon Board of Parole</i> 833 F.2d 1289 (9th Cir. 1987)	12
26	<i>Juan H. v. Allen</i> 408 F.3d 1262 (9th Cir. 2005)	20
27		
28	<i>Lockyer v. Andrade</i> 583 U.S. 63 (2003)	10

TABLE OF AUTHORITIES (continued)

	Page
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988)	11
Nguyen v. Garcia 477 F.3d 716 (9th Cir. 2007)	14
Pedro v. Oregon Parole Board 825 F.2d 1396 (9th Cir. 1987)	11
Rompilla v. Beard 545 U.S. 374 (2005)	13
Sandin v. Conner 515 U.S. 472 (1995)	8
Sass v. Cal. Bd. of Prison Terms 461 F.3d 1123 (9th Cir. 2006)	8, 9, 16, 19
Schrivo v. Landrigan ____ U.S. ___, 127 S. Ct. 1933 (2007)	13, 14
Stanley v. Cal. Supreme Court 21 F.3d 359 (9th Cir. 1994)	2
Wainwright v. Greenfield 474 U.S. 284 (1986)	14
Wiggins v. Smith 539 U.S. 510 (2003)	13
Wilkinson v. Austin 545 U.S. 2384 (2005)	12, 14
Williams (Terry) v. Taylor 529 U.S. 362 (2000)	10
Wolff v. McDonnell 418 U.S. 539 (1974)	14
Ylst v. Nunnemaker 501 U.S. 797 (1991)	10
Regulations	
California Code of Regulations, Title 15	
§ 2402	9
§ 2402(a)	17
§ 2402(b)	21

TABLE OF AUTHORITIES (continued)

	Page
1	
2	
Statutes	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
Ans. to OSC; Mem. of P. & A.	
	<i>Hernandez v. Schwarzenegger</i> C07-3427 PJH

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28 **ANSWER TO THE ORDER
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MEMORANDUM OF POINTS
AND AUTHORITIES**

29 Judge: The Honorable
30 Phyllis J. Hamilton

31 **INTRODUCTION**

32 Petitioner Hector Hernandez is a California state inmate incarcerated at the Correctional
33 Training Facility in Soledad, California, proceeding pro se in this habeas corpus action.
34 Petitioner alleges that the Governor unconstitutionally denied him parole in November 2006. In
35 issuing the Order to Show Cause, this Court found cognizable Petitioner's claim that the
36 Governor's decision was "not supported by evidence sufficient to avoid a due process violation,"
37 citing Ninth Circuit authority that addressed the issues of continued reliance on the commitment
38 offense to deny parole and the application of the some-evidence standard. (Order to Show

1 Cause, filed July 9, 2007, at 2.) Respondent Warden Ben Curry answers as follows:^{1/}

2 **ANSWER TO THE ORDER TO SHOW CAUSE**

3 In response to the Petition for Writ of Habeas Corpus and this Court's July 9, 2007 Order to
4 Show Cause, Respondent admits, denies, and alleges the following:

5 1. Petitioner is lawfully in the custody of the California Department of Corrections and
6 Rehabilitation following his March 1986 conviction of second-degree murder with use of a
7 firearm. (Ex. 1, Judgment-Commitment; Ex. 2, Probation Officer's Report, at 2.) He is currently
8 serving an indeterminate sentence of seventeen years to life. (*Id.*) Petitioner does not challenge
9 his underlying conviction in the current proceeding.

10 2. On August 15, 1985, Petitioner "shot to death Sylvestre Bustos while attempting to
11 purchase heroin." The confrontation resulting in Mr. Bustos's death began earlier that morning
12 when Petitioner went to Mr. Bustos's home to purchase heroin. Petitioner initially knocked on
13 one of the windows, which awoke Mr. Bustos's roommate, Enrique Casias. Mr. Casias opened
14 the window and, after talking with Petitioner, agreed to sell him some heroin for twenty dollars.
15 After Petitioner paid, Mr. Casias went to retrieve the heroin, which was hidden inside Mr.
16 Bustos's boots next to the living room couch. At that time, Mr. Bustos was asleep on the couch
17 "with a gun tucked into his waistband" and there were other people in the house as well.

18 While Mr. Casias was bent over the boots, Petitioner forced his way through the home's
19 front door. Armed with a sawed-off shotgun, Petitioner demanded Mr. Bustos's gun and heroin.
20 When Mr. Bustos arose from the couch, Petitioner shot him from a distance of approximately
21 seven to eight feet and then fled, taking Mr. Bustos's gun with him. Mr. Bustos was
22 subsequently pronounced dead at the scene. Petitioner was apprehended approximately three
23 weeks later and, following a jury trial, convicted of second-degree murder. (Ex. 2 at 2-5; Ex. 3,

24
25 1. The proper respondent in this action is Ben Curry, the acting warden at the Correctional
26 Training Facility in Soledad, where Petitioner is incarcerated. *Stanley v. Cal. Supreme Court*, 21
27 F.3d 359, 360 (9th Cir. 1994) (holding that the warden where petitioner is incarcerated is the proper
28 respondent); Rule 2(a), 28 U.S.C. §§ 2254. Because the actions complained of in this petition
concern a Governor parole decision, however, the term "Governor" is used interchangeably with
Respondent in this answer and supporting memorandum of points and authorities.

1 Governor's Indeterminate Sentence Parole Release Review, at 1; Ex. 4, July 2005 Life Prisoner
 2 Evaluation Report [Board Report] at 1.)

3 3. On June 8, 2006, the Board of Parole Hearings found Petitioner suitable for parole. In
 4 calculating Petitioner's sentence, the Board determined that Petitioner's murder offense included
 5 the aggravating circumstances of use of a weapon and severe trauma to the victim. (Ex. 5,
 6 Excerpt of June 8, 2006 Subsequent Parole Consideration Hearing [cover and decision pages
 7 only], at Decision Page 10.)

8 4. On October 20, 2006, the Board issued Petitioner a letter indicating that the June 2006
 9 hearing panel's decision was final. Petitioner was advised, however, that "[t]he decision finding
 10 [him] suitable for parole may be subject to review by the Governor." (Ex. 6, Oct. 20, 2006
 11 letter.)

12 5. On November 3, 2006, the Governor's office issued a cover letter and written decision,
 13 both of which indicated that Governor Schwarzenegger had reversed the Board's decision finding
 14 Petitioner suitable for parole. The cover letter informed petitioner that the Governor's decision
 15 was based on the same factors considered by the Board and that the decision was made pursuant
 16 to Penal Code section 3041.2, which authorizes the Governor to review the Board's parole
 17 decisions regarding persons sentenced to an indeterminate term for a murder conviction. (Ex. 3;
 18 Ex. 7, Nov. 3, 2006 Cover Letter.)

19 6. The Governor's 2005 decision initially recounted the facts of Petitioner's murder
 20 offense. The Governor then addressed Petitioner's disciplinary history, which consisted of seven
 21 disciplinary actions for rules violations, including possession of a utility blade knife and inmate
 22 manufactured alcohol (Ex. 8, Disciplinary History Sheet), and twelve instances in which he was
 23 counseled for "minor misconduct," most recently in 2000. (Ex. 3 at 1; Ex. 4 at 5-6.)

24 7. The Governor also considered the evidence in support of Petitioner's parole, finding
 25 that Petitioner had "made efforts to enhance his ability to function within the law upon release."
 26 The evidence in support of parole included Petitioner's educational, vocational, work-
 27 assignment, and self-help programming. In addition, the Governor found Petitioner had
 28 maintained "seemingly solid relationships and close ties with supportive family and friends" and

1 that he had received "some positive evaluations from mental-health and correctional
 2 professionals over the years." (Ex. 3 at 1.)

3 8. The Governor also found that Petitioner had made parole plans. The Governor stated,
 4 however, that while Petitioner had marketable skills he had not yet secured a job offer. The
 5 Governor determined that "[h]aving a legitimate way to provide financial support for himself
 6 immediately upon release is essential to [Petitioner's] success on parole." (Ex. 3 at 2.)

7 9. In weighing the evidence in support of parole, the Governor indicated that "[d]espite
 8 the positive factors," Petitioner's murder offense was "particularly grave, in part because of the
 9 callous manner in which it was carried out." The Governor noted the probation officer's
 10 determination that the victim had been "particularly vulnerable" when Petitioner had burst into
 11 the victim's house and then shot the victim "just after waking him up." (Ex. 3 at 2.)

12 The Governor also determined that there was some evidence of premeditation. The
 13 Governor referenced the Court of Appeal opinion regarding Petitioner's offense, which indicated
 14 that at his criminal trial Petitioner testified he had previously purchased heroin from the victim
 15 on several prior occasions. According to one witness, Petitioner had been arguing with the
 16 victim over the quantity of the heroin he received just days before the murder. (Ex. 9, Jan. 25,
 17 1988 California Court of Appeal opinion, at 5.) Further, Petitioner not only went to the victim's
 18 residence armed with a shotgun, he then "forced his way through the front door of the residence
 19 and shot Mr. Bustos when he got up off the couch." As a result, the Governor concluded that
 20 the gravity of Petitioner's crime "is alone sufficient for me to conclude presently that his release
 21 from prison would pose an unreasonable public-safety risk." (Ex. 3 at 2.)

22 10. The Governor also considered Petitioner's statement that he was remorseful and
 23 accepted responsibility for his actions. But the Governor noted that Petitioner stated in the Board
 24 Report that "the actual gunshot which took [Mr. Bustos'] life was fired in self-defense."
 25 Similarly, Petitioner had claimed in his 2006 mental health evaluation that the victim had pulled
 26 his gun and fired before Petitioner shot him. (Ex. 10, May 2006 Mental Health Evaluation, at 3.)
 27 The Governor indicated that this self-defense claim was contrary to the statements of at least two
 28 witnesses, who indicated both in the Fresno County Sheriff's report (ex. 11, Sheriff's Department

1 report) and at trial (ex. 9 at 5) that they had heard only one gunshot on the night of the murder.
 2 (Ex. 3 at 2.) Additionally, according to the Probation Officer's Report (ex. 2 at 3), the Governor
 3 considered that a witness saw Petitioner take the gun from the victim. (Ex. 3 at 2.)

4 "[I]n any event," the Governor stated that Petitioner had taken "a sawed-off shotgun to Mr.
 5 Bustos's home, kicked open the door to the residence, and, according to the Court of Appeal
 6 opinion, pointed the gun at everyone inside." In addressing the dangerous situation Petitioner
 7 had created, the Governor considered that the 2003 Board panel had asked Petitioner about his
 8 self-defense claim and how he would have expected Mr. Bustos to respond to Petitioner's
 9 intrusion into his home while armed with a shotgun. Petitioner acknowledged that he would not
 10 have expected a different outcome, saying that he would expect "[p]robably everything that
 11 happened." (Ex. 3 at 2; ex. 21, Excerpts of Feb. 2003 Subsequent Parole Consideration Hearing
 12 Transcript, at 47-48.)

13 11. The Governor also considered that when Petitioner committed this murder he was 26
 14 years old and "already had an extensive criminal record." The Governor indicated that
 15 Petitioner's juvenile record included adjudications for "armed robbery, assault with a deadly
 16 weapon, burglary, petty theft, carrying a concealed firearm, joyriding, and resisting an officer."
 17 Further, the Governor observed that Petitioner's criminal conduct continued as an adult with
 18 convictions for "discharging a firearm at an occupied dwelling/vehicle, harboring a federal
 19 fugitive, being under the influence of a controlled substance, and driving under the influence of a
 20 controlled substance." Additionally, the Governor noted that Petitioner had admitted to the
 21 probation officer that he "routinely abused heroin, and he used cocaine, LSD, marijuana and PCP
 22 prior to the life offense." The Governor therefore concluded that Petitioner's "criminal history,
 23 which began at a young age and include incidents of violent and assaultive behavior toward
 24 others, demonstrates his unwillingness to conform his behavior to the rules of society, and this
 25 weighs against his parole suitability at this time." (Ex. 3 at 2; Ex. 2 at 5-15; Ex. 4 at 3-4.)

26 12. The Governor stated that the 2006 Board panel had "noted [Petitioner's] prior criminal
 27 history and drug abuse when it found he 'committed the crime as a result of significant stress in
 28 [his] life.' But the Governor also observed that the Board found this stress was "self-induced"

1 and that the panel clarified that “[w]e’re not in any way, shape or form saying that you had stress
 2 in your life.” The Governor then stated that while Petitioner was “indeed abusing heroin at the
 3 time, he was also aware of available treatment programs in the community,” as evidenced by his
 4 telling the probation officer that he had completed a Methadone treatment program in 1985, the
 5 same year in which he later murdered Mr. Bustos. Thus, the Governor concluded that even if
 6 Petitioner was “under stress” when he committed the murder, the Governor believed “that factor
 7 alone is presently insufficient to mitigate the nature and circumstances of the murder.” (Ex. 3 at
 8 3; Ex. 2 at 15.)

9 13. Finally, the Governor considered that the Fresno County District Attorney had opposed
 10 parole in regard to Petitioner’s 2006 parole hearing “based, in part, of the gravity of the offense,
 11 [Petitioner’s] lengthy criminal and drug abuse history, his lack of insight into the nature of his
 12 offense, and his failure to establish concrete parole plans.” (Ex. 3 at 3; Ex. 12, Fresno County
 13 District Attorney letter.)

14 14. In his conclusion, the Governor stated that Petitioner was now age 47 and, “after being
 15 incarcerated for more than 21 years,” had made “some creditable gains in prison.” But the
 16 Governor concluded that based on the record before him, and “after carefully considering the
 17 very same factors the Board must consider, I find that the negative factors weighing against
 18 [Petitioner’s] parole suitability presently outweigh the positive ones.” As a result, because the
 19 Governor determined that Petitioner’s parole release would “pose an unreasonable risk of danger
 20 to society at this time,” he reversed the Board’s 2006 decision to grant Petitioner parole. (Ex. 3
 21 at 3.)

22 15. On January 11, 2007, the Fresno County Superior Court denied Petitioner’s habeas
 23 corpus petition in which Petitioner appears to have alleged the same causes of action as found
 24 cognizable in his federal Petition. The superior court initially stated that regardless of whether or
 25 not the court agreed with the Governor’s decision, it could not overturn that decision so long as it
 26 was supported by some evidence. The court then found that the Governor’s decision was
 27 supported by some evidence that Petitioner’s parole release “could pose an unreasonable risk to
 28 society or a threat to public safety, because of the violent nature of the original offense, and the

1 escalating pattern of petitioner's criminal conduct before the murder, as well as his multiple
 2 disciplinary infractions during his incarceration."

3 As to the murder offense, the court specifically found that there was some evidence of
 4 premeditation and that the murder was "committed in a callous manner." Further, the court
 5 indicated that although Petitioner claimed he shot Mr. Bustos in self-defense, two witnesses had
 6 testified that they heard only one shot. Also, the court determined that Petitioner had "created the
 7 dangerous situation by forcing his way into Bustos' residence armed with a shotgun." The court
 8 thus found that "the Governor's skepticism about petitioner's expressed remorse and acceptance
 9 of responsibility has at least some basis in fact." In denying the petition, the court concluded that
 10 "there was at least some evidence that petitioner might still pose a risk if released based on the
 11 petitioner's criminal history, as well as the seriousness of the life offense itself and the
 12 petitioner's multiple disciplinary infractions while incarcerated." (Ex. 13, Cal. Super. Ct. Pet.;
 13 ex. 14, Cal. Super. Ct. Order.)

14 16. On March 1, 2007, the California Court of Appeal summarily denied Petitioner's
 15 habeas corpus petition, in which he alleged the same causes of action as in his federal Petition.
 16 (Exs. 15-16.)

17 17. On May 9, 2007, the California Supreme Court summarily denied Petitioner's petition
 18 for review, in which he alleged the same causes of action as in his federal Petition. (Exs. 17-18.)
 19 Hence, Respondent admits that Petitioner has exhausted his state court remedies in regard to the
 20 issues currently before this Court. However, Respondent does not admit that Petitioner has
 21 exhausted his claims to the extent that they are more broadly interpreted to encompass any
 22 systematic issues beyond this particular review of the Governor's November 2006 parole denial.

23 18. Respondent denies that Petitioner has shown that the state court's denial of
 24 habeas corpus was contrary to, or involved an unreasonable application of, clearly established
 25 Supreme Court law, or that the denial was based on an unreasonable determination of facts in
 26 light of the evidence presented. Petitioner therefore fails to make a case for relief under the
 27 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

28 19. Respondent denies that Petitioner has a federally protected liberty interest in parole.

1 *Greenholtz v. Inmates of Neb. Pen. & Corr. Complex*, 442 U.S. 1 (1979); *In re Dannenberg*, 34
 2 Cal. 4th 1061, 1087-88 (2005) (clarifying that under California Penal Code section 3041, the
 3 setting of a parole release date is neither mandatory nor presumed); *Sandin v. Conner*, 515 U.S.
 4 472, 484 (1995); *contra Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006).
 5 Accordingly, because Petitioner is not in custody in violation of federal law, he has not alleged a
 6 federal question and this Court does not have subject matter jurisdiction to decide his petition.
 7 28 U.S.C. § 2254(a).

8 20. Respondent affirmatively alleges that even if Petitioner has a federally protected liberty
 9 interest in parole, Petitioner had an opportunity to present his views at his 2006 parole hearing,
 10 and that the Governor provided Petitioner with a detailed explanation as to why he was denied
 11 parole. Hence, Petitioner received all the process due under *Greenholtz*, the only clearly
 12 established Supreme Court law regarding the due process rights of inmates at parole
 13 consideration hearings.

14 21. Respondent affirmatively alleges that there is no United States Supreme Court decision
 15 requiring a state parole decision to be supported by some evidence. *See Carey v. Musladin*, __
 16 U.S. __ 127 S. Ct. 649, 654 (2006) (holding that the absence of Supreme Court law on a
 17 particular issue precludes habeas relief under AEDPA). Thus, Petitioner has not shown that the
 18 state court's denial of habeas corpus was contrary to, or involved an unreasonable application of,
 19 clearly established Supreme Court law, or that the denial was based on an unreasonable
 20 determination of facts in light of the evidence presented. Hence, Petitioner fails to make a *prima
 21 facie* case for relief under AEDPA.

22 22. Respondent affirmatively alleges that the Governor considered all reliable and relevant
 23 evidence in determining Petitioner's suitability for parole, and that the Governor's decision
 24 finding that Petitioner's parole release would "pose an unreasonable risk of danger to society at
 25 this time" (Ex. 3 at 3) is supported by some evidence.

26 23. Respondent affirmatively alleges that the Governor properly considered the gravity of
 27 Petitioner's commitment offense and criminal history, as required under California Penal Code
 28 section 3041(b), as well as his post-incarceration disciplinary history and parole plans, as

1 provided for under California Code of Regulations, title 15, section 2402. Respondent further
 2 affirmatively alleges that federal due process, as determined by clearly established Supreme
 3 Court law, does not preclude the Governor from relying on the immutable factors of the crime
 4 and criminal history to deny parole. *Iron v. Carey*, __F.3d __, 2007 WL 2027359 (9th Cir. July
 5 13, 2007); *Sass*, 461 F.3d at 1129.

6 24. Respondent denies that the Governor's November 2006 decision denying parole
 7 violated Petitioner's federal due process rights.

8 25. Respondent affirmatively alleges that Petitioner fails to state or establish any grounds
 9 for federal habeas corpus relief.

10 26. Respondent affirmatively alleges that if the petition is granted, Petitioner's remedy is
 11 limited to a new parole review by the Governor that comports with due process. *Benny v. U.S.*
 12 *Parole Comm'n*, 295 F.3d 977, 984-85 (9th Cir. 2002) (finding that the parole authority must
 13 exercise the discretion in determining whether or not an inmate is suitable for parole); *In re*
 14 *Rosenkrantz*, 29 Cal. 4th 616, 658 (2002) (finding that the proper remedy if a parole decision
 15 lacks some evidence is a new proceeding that comports with due process).^{2/}

16 27. Respondent does not allege that there is any procedural bar to this action, including
 17 statute of limitations or non-retroactivity.

18 28. Respondent denies that an evidentiary hearing is necessary in this matter.

19 29. Except as expressly admitted above, Respondent denies, generally and
 20 specifically, each and every allegation of the petition, and specifically denies that Petitioner's
 21 administrative, statutory, or constitutional rights have been violated in any way.

22 For the reasons stated in this Answer and in the following Memorandum of Points and
 23 Authorities, this Court should deny the Petition.

24 //

25

26 2. Although *Rosenkrantz* specifically addressed the remedy regarding Board parole hearing,
 27 because the Governor and the Board possess equal discretion in reviewing parole suitability, equal
 28 remedies should be applied to correct due process violations. *In re Capistran*, 107 Cal. App. 4th
 1299, 1307 (2003).

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I.

THE STATE COURT'S DENIAL OF PETITIONER'S HABEAS CLAIM WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, NOR BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS.

7 Under AEDPA, when a state inmate's claim has been adjudicated on the merits in state
8 court, a federal court may grant a writ of habeas corpus on the same claim only if the state court's
9 adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly
10 established Federal law, as determined by the Supreme Court of the United States;" or (2) "based
11 on an unreasonable determination of the facts in light of the evidence presented at the State Court
12 proceeding." 28 U.S.C. § 2254(d)(1-2).

13 “Clearly established federal law, as determined by the Supreme Court of the United States,”
14 refers to “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time
15 of the relevant state-court decision.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412 (2000). A
16 state court decision is contrary to established federal law if “the state court applies a rule that
17 contradicts the governing law set forth in [United States Supreme Court] cases,” or “the state
18 court confronts a set of facts that are materially indistinguishable from a decision of [the United
19 States Supreme] Court and nevertheless arrives at a result different from [the Court’s]
20 precedent.” *Lockyer v. Andrade*, 583 U.S. 63, 73 (2003) (citations and internal quotation marks
21 omitted). A state court decision is an unreasonable application of clearly established law “if the
22 state court identifies the correct governing legal principle from [the United States Supreme
23 Court’s] decision but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.*
24 at 75. It is not enough that the state court applies the law erroneously or incorrectly; rather, the
25 application must be objectively unreasonable. *Id.* at 75-76.

When, as here, the California Supreme Court denies a petition for review without comment, the federal court will look to the last reasoned decision as the basis for the state court's judgment. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). In this case, the last reasoned

1 decision is the Fresno County Superior Court's order denying Petitioner's habeas claims. (Ex.
2 14.) As this decision is neither contrary to or an unreasonable application of federal law, nor
3 based on an unreasonable determination of the facts in light of the evidence presented, Petitioner
4 fails to establish a violation of AEDPA standards. Therefore, his petition for writ of habeas
5 corpus must be denied.

A. The State Court Decision Was Not Contrary to or an Unreasonable Interpretation of Clearly Established Federal Law.

8 The first standard under AEDPA is that a state court habeas decision must not be contrary
9 to, or an unreasonable interpretation of, clearly established federal law. Here, Petitioner received
10 all process due under *Greenholtz*, the only clearly established federal law regarding the due
11 process rights of inmates at a parole consideration hearing. Furthermore, federal law does not
12 preclude the Board from relying on the commitment offense or other immutable factors to deny
13 parole. As such, the state court decision denying relief must stand.

1. Petitioner received all process due under the only United States Supreme Court law addressing due process in the parole context.

16 The setting of a parole date is not part of the criminal prosecution so the full panoply of
17 rights afforded a defendant in a criminal proceeding are not constitutionally mandated in a parole
18 proceeding. *Pedro v. Or. Parole Bd.*, 825 F.2d 1396, 1398-99 (9th Cir. 1987). The only
19 Supreme Court decision to address the requirements of due process at a parole consideration
20 hearing has held that a parole board's procedures are constitutionally adequate if the inmate is
21 given an opportunity to be heard and a decision informing him of the reasons he did not qualify
22 for parole. *Greenholtz*, 442 U.S. at 16. Thus, as a matter of "clearly established" Supreme Court
23 law for review of a federal habeas corpus petition under AEDPA, an inmate's challenge to a
24 parole decision will fail if the inmate has received the protections required under *Greenholtz*.
25 *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988).³⁷

27 3. The Supreme Court has continued to cite *Greenholtz* approvingly for the proposition that
28 the “level of process due for inmates being considered for release on parole includes an opportunity
to be heard and notice of any adverse decision” and noted that *Greenholtz* remains “instructive for

1 Here, Petitioner does not contend that he failed to receive these protections. (See
 2 *generally* Pet.) Rather, it is undisputed that Petitioner appeared at the June 2006 Board parole
 3 consideration hearing and received an opportunity to be heard, and that the Governor, after
 4 considering the same factors considered by the Board, issued a decision informing Petitioner of
 5 the grounds upon which he was denied parole. (Ex. 3 at 3; ex. 7.) Because Petitioner thus
 6 received all the process due under the United States Supreme Court precedent finding a federal
 7 liberty interest in discretionary parole release, the state court decision was not contrary to or an
 8 unreasonable application of clearly established federal law as determined by the United States
 9 Supreme Court. *See* 28 U.S.C. § 2254(d).

10 **2. The Ninth Circuit's some-evidence test is not clearly established Supreme
 11 Court law, and thus not applicable to Petitioner's federal habeas corpus
 12 claims under AEDPA.**

13 Petitioner alleges that the Governor's decision must be overturned because it is not
 14 supported by some evidence. This argument stems from the holding in *Hill*, 472 U.S. at 455, in
 15 which the United States Supreme Court determined that some evidence must support the decision
 16 of a prison disciplinary board to revoke good time credits. In *Jancsek v. Oregon Board of
 17 Parole*, 833 F.2d 1289, 1290 (9th Cir. 1987), the Ninth Circuit held that this standard applies not
 18 only in the disciplinary context, but the parole context as well, and that some evidence must
 19 support the Board's denials of parole. Because the holding in *Jancsek* is not clearly established
 20 federal law under AEDPA standards, the some-evidence standard may not be applied in federal
 habeas proceedings challenging parole denials.

21 As the Supreme Court clarified in *Musladin*, 127 S. Ct. 649, where the Court has not
 22 applied a test or standard to a certain type of case it cannot be said that the failure of a state court
 23 to do so was an unreasonable application of clearly established federal law. In *Musladin*, the
 24 petitioner challenged a state court decision finding that the fact that the victim's family wore
 25 buttons displaying the victim's image at the defendant trial was not inherently prejudicial. *Id.* at

26
 27 [its] discussion of the appropriate level of procedural safeguards." *Wilkinson v. Austin*, 545 U.S.
 28 2384, 2397 (2005).

1 650. The Ninth Circuit held that the state court decision was contrary to or an unreasonable
 2 application of federal law regarding state sponsored courtroom practices. *Id.* In reversing the
 3 Ninth Circuit, the Supreme Court noted that although it had articulated a test to determine
 4 whether state sponsored courtroom practices were inherently prejudicial, it had never addressed
 5 the issue of whether conduct by a private party was so prejudicial that it deprived the defendant
 6 of his right to a fair trial. *Id.* at 654. “Given the lack of holdings” on the specific issue, the Court
 7 reversed the Ninth Circuit and held that the state court’s decision was not an unreasonable
 8 application of federal law. *Id.*

9 The Supreme Court has since reiterated its holding in *Musladin*, confirming that a state
 10 court decision cannot be contrary to or an unreasonable application of federal law where the
 11 Court has not addressed what protection or test is required in a specific factual or legal scenario.
 12 In *Schrivo v. Landrigan*, ____U.S.____, 127 S. Ct. 1933 (2007), the Ninth Circuit found that the
 13 state court unreasonably applied *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*,
 14 545 U.S. 374, 381 (2005) when it denied federal habeas relief to a defendant asserting ineffective
 15 assistance of counsel, despite the fact that he had refused to allow the presentation of any
 16 mitigating evidence. *Landrigan*, 127 S. Ct. at 1942. The Supreme Court reversed that part of the
 17 decision after distinguishing the facts of the case from those in *Wiggins* and *Rompilla*. *Wiggins*
 18 did not address a situation in which the client had interfered with counsel’s efforts to present
 19 mitigating evidence. *Id.* And in *Rompilla*, the defendant had not informed the court that he did
 20 not want mitigating evidence presented. *Id.* Because the high court had never addressed a
 21 situation like the one raised in *Landrigan*, the state court’s decision was not objectively
 22 unreasonable. *Id.*

23 Several recent Ninth Circuit decisions also emphasize that there can be no clearly
 24 established federal law where the Supreme Court has never addressed a particular issue or
 25 applied a certain test to a specific type of proceeding. *Crater v. Galaza*, ____F.3d____, 2007 WL
 26 1965122, *2, 5 and n.8 (9th Cir. July 9, 2007) (citing *Musladin*, the Ninth Circuit acknowledged
 27 that decisions by courts other than the Supreme Court as “non-dispositive” under § 2254(d)(1));
 28 *Foote v. Del Papa*, ____F.3d____, 2007 WL 1892862 (9th Cir. July 3, 2007) (affirming district

1 court's denial of petition alleging ineffective assistance of appellate counsel based on an alleged
 2 conflict of interest because no Supreme Court case has held that such an irreconcilable conflict
 3 violates the Sixth Amendment); *Nguyen v. Garcia*, 477 F.3d 716, 718, 727 (9th Cir. 2007)
 4 (holding that state court's decision finding *Wainwright v. Greenfield*, 474 U.S. 284 (1986) did
 5 not apply to a state court competency hearing was not contrary to clearly established federal law
 6 because Supreme Court had not held that *Wainwright* applied to competency hearings);^{4/}

7 Because the Supreme Court developed the some-evidence standard in the context of a
 8 prison disciplinary hearing, which is fundamentally different from a parole proceeding,
 9 application of this standard to a parole decision cannot be clearly established federal law.
 10 *Musladin*, 127 S. Ct. at 654; *Landrigan*, 127 S. Ct. at 1942. The level of due process protections
 11 to which an inmate is entitled is directly related to the level of his liberty interest and the nature
 12 of the decision being made. *Greenholtz*, 442 U.S. at 13-14. At a disciplinary hearing, the inquiry
 13 is retrospective and factual in nature, and the prisoner faces a potential loss of credits.
 14 *Greenholtz*, 442 U.S. at 14. A decision to parole an inmate is fundamentally different. First, the
 15 level of liberty interest an inmate has in the possibility of parole is markedly different from that
 16 of an inmate who is facing a loss of credits. *Wolff v. McDonnell*, 418 U.S. 539, 560-561 (1974)
 17 (contrasting the different interests that a parolee and a prisoner may have in their deprivation of
 18 liberty); *Greenholtz*, 442 U.S. at 13-14 (distinguishing the parole suitability decision from the
 19 parole revocation and disciplinary decisions). Second, a parole decision is not factual in nature.
 20 Rather, it is a predictive and subjective decision requiring discretionary analysis of the inmate's
 21 suitability for release. *Greenholtz*, 442 U.S. at 9-10; *Wilkinson*, 545 U.S. at 229. In fact, due to
 22 the discretionary nature of parole decisions, the Supreme Court has held that, in contrast to prison
 23 disciplinary hearings, due process does not require the decision-maker to specify the evidence
 24 showing that a prisoner is unsuitable for parole. *Greenholtz*, 442 U.S. at 15.

25 In summary, application of the some-evidence standard to a parole proceeding is not

27 4. As required by local rule, a copy of *Foote v. Del Papa*, ___ F.3d ___, 2007 WL 1892862
 28 (July 3, 2007) is attached as Exhibit 19; and *Crater v. Galaza*, ___ F.3d ___, 2007 WL 1965122 (July
 9, 2007) is attached as Exhibit 20.

1 clearly established federal law. Instead, the *only* clearly established Supreme Court authority
 2 describing the process due when there is a federal liberty interest in parole simply requires that
 3 the inmate be given an opportunity to be heard and advised of the reasons he was not found
 4 suitable for parole. *Greenholtz*, 442 U.S. at 16. Indeed, in *Greenholtz* the Supreme Court
 5 rejected the argument that due process requires an evidentiary standard of review in parole cases,
 6 holding that “nothing in the due process concepts as they have thus far evolved that requires the
 7 Parole Board to specify the particular ‘evidence’ in the inmate’s file or at his interview on which
 8 it rests the discretionary determination that an inmate is not ready for conditional release.” *Id.* at
 9 15-16. The Supreme Court has thus explicitly rejected the notion that a parole decision must be
 10 supported by any particular quantum of evidence. *Id.*

11 Accordingly, because application of the some-evidence standard to parole denial
 12 challenges is not clearly established Supreme Court law regarding federal due process, AEDPA
 13 precludes this standard from being applied to Petitioner’s claims in this case. *See* 28 U.S.C. §
 14 2254(d); *Musladin*, 127 S. Ct. at 654.

15 **3. Even if the some-evidence standard was clearly established federal
 16 law, the standard was correctly applied by the state courts.**

17 Even if the some-evidence standard was clearly established federal law for AEDPA
 18 purposes, Petitioner’s claim would nonetheless fail because the state court correctly applied the
 19 standard. Under California law, the proper level of judicial review is whether “some evidence in
 20 the record before the Board supports the decision to deny parole, based upon the factors specified
 21 by statute and regulation.” *Rosenkrantz*, 29 Cal. 4th at 658. The some-evidence standard “does
 22 not require examination of the entire record, independent assessment of the credibility of
 23 witnesses, or weighing of the evidence;” rather, it is satisfied if there is “any evidence in the
 24 record that could support the conclusion reached by the [B]oard.” *Hill*, 472 U.S. at 455-57; *see also* *Sass*, 461 F.3d at 1129 (stating that “*Hill*’s some evidence standard is minimal.”)

25 Here, the state court reasonably determined the Governor’s decision denying parole was
 26 supported by some evidence that Petitioner’s parole release “could pose an unreasonable risk to
 27 society or a threat to public safety, because of the violent nature of the original offense, and the

1 escalating pattern of petitioner's criminal conduct before the murder, as well as his multiple
 2 disciplinary infractions during his incarceration." (Ex. 14 at 2-4.) As to the murder offense, the
 3 state court specifically found that there was some evidence of premeditation and that the murder
 4 was "committed in a callous manner." (Ex. 14 at 3.) Further, the court indicated that although
 5 Petitioner claimed he shot Mr. Bustos in self-defense, two witnesses had testified that they heard
 6 only one shot. (*Id.*) Also, the court determined that Petitioner had "created the dangerous
 7 situation by forcing his way into Bustos' residence armed with a shotgun." (*Id.*) The court thus
 8 reasonably found that "the Governor's skepticism about petitioner's expressed remorse and
 9 acceptance of responsibility has at least some basis in fact." (*Id.*)

10 Based on the state court's review of the Governor's decision, Petitioner cannot show that
 11 the state court unreasonably concluded that "there was at least some evidence that petitioner
 12 might still pose a risk if released based on the petitioner's criminal history, as well as the
 13 seriousness of the life offense itself and the petitioner's multiple disciplinary infractions while
 14 incarcerated." (Ex. 14 at 4.) Moreover, although not explicitly considered by the state court, the
 15 Governor had also cited Petitioner's lack of a job offer in his parole plans, stating that "[h]aving
 16 a legitimate way to provide financial support for himself immediately upon release is essential to
 17 [Petitioner's] success on parole." (Ex. 3 at 2.) This Court may consider that aspect of the
 18 Governor's decision as further grounds in support of the validity of the state court decision given
 19 that under AEDPA, this Court is only concerned with whether the superior court's decision
 20 granting or denying relief, as opposed to its reasoning, is contrary to or an unreasonable
 21 application of Supreme Court law. *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002)
 22 (determining in habeas proceedings that "the intricacies of the state court's analysis need not
 23 concern us; what matters is whether the *decision* the court reached was contrary to controlling
 24 federal law").

25 Accordingly, to the extent that the some-evidence test in *Superintendent v. Hill* is clearly
 26 established federal law, Petitioner's claims must be denied because he cannot show that this
 27 standard was unreasonably applied by the state courts.

28 //

1 **4. The Governor may rely on static factors to deny parole.**

2 Petitioner also argues that due process precludes the Governor from relying on static
 3 factors—namely, the circumstances of the commitment offense and his significant criminal
 4 record—to deny parole. (Pet. at 11-12.) But for several reasons, Petitioner cannot show that the
 5 state court’s decision to uphold the Governor’s parole denial based in part of these immutable
 6 factors was contrary to, or an unreasonable application of, clearly established Supreme Court
 7 law.

8 First, California Penal Code section 3401 requires that the parole authority examine the
 9 commitment offense, providing that the parole authority “shall set a release date unless it
 10 determines that the gravity of the current convicted offense or offenses, or the timing and gravity
 11 of current or past convicted offense or offenses, is such that consideration of the public safety
 12 requires a more lengthy period of incarceration.” Cal. Pen. Code, § 3041(b); *Dannenberg*, 34
 13 Cal. 4th at 1080.²⁴ The applicable regulations also provide that a prisoner shall be denied parole
 14 if he “will pose an unreasonable risk of danger to society if released from prison.” Cal. Code
 15 Regs. tit. 15, § 2402(a).

16 Second, the California Supreme Court held in *Dannenberg* that the parole authority may
 17 rely *solely* on the circumstances of the commitment offense. 34 Cal. 4th at 1094. Hence, “an
 18 inmate whose offense was so serious as to warrant, at the outset, a maximum term of life in
 19 prison, may be denied parole during whatever time the Board deems required for ‘this individual’
 20 by ‘consideration of the *public safety*.’” *Id.* at 1084.

21 Third, the Governor’s consideration of public safety is not limited solely to the inmate’s
 22 potential for violence as suggested by Petitioner’s argument that it is improper to consider the
 23 static circumstances of his commitment offense given the length of time since that offense was
 24 committed. Rather, the Supreme Court has indicated that the parole authority’s consideration of
 25 the commitment offense also must account for “whether, in light of the nature of the crime, the

26
 27 5. The Governor’s parole suitability decisions are subject to the same due process
 28 requirements that apply to the Board. *Rosenkrantz*, 29 Cal. 4th at 660.

1 inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others,
 2 and undermine respect for the administration of justice." *Greenholtz*, 442 U.S. at 8.

3 The Ninth Circuit's holding in *Biggs v. Terhune*, 334 F.3d 910 (9th Cir. 2003), does not
 4 compel a different result. In *Biggs*, the Ninth Circuit stated that the Board's continuing reliance
 5 on an unchanging factor to deny parole "could result in a due process violation." *Id.* at 917.
 6 However, the *Biggs* court did not definitively indicate that reliance on an unchanging factor
 7 necessarily violates due process, only that it possibly could. Indeed, the court praised *Biggs* for
 8 being "a model inmate," and found that the record was "replete with the gains *Biggs* has made,"
 9 including a master's degree in business administration. *Id.* at 912. Nonetheless, the court denied
 10 habeas relief because the Board's decision to deny parole—which relied solely on the commitment
 11 offense—was supported by some evidence. *Id.* at 917.

12 Most importantly, the statement in *Biggs* is merely circuit court dicta, and not clearly
 13 established federal law sufficient to overturn a state court decision under AEDPA standards. The
 14 Ninth Circuit has emphasized that *Biggs* does not contain mandatory language, and that "[u]nder
 15 AEDPA, it is not our function to speculate about how future parole hearings could proceed."
 16 *Sass*, 461 F.3d at 1129. The *Sass* court then rejected the argument that the Board's reliance on
 17 "immutable behavioral evidence" to deny parole violated federal due process. *Id.*

18 The Ninth Circuit most recently addressed this issue in *Irons*. In overturning a district
 19 court grant of habeas corpus, the Ninth Circuit held that despite substantial evidence of the
 20 inmate-petitioner's rehabilitation, the Board acted properly and did not abuse its discretion by
 21 relying on the circumstances of the commitment offense to deny parole. *Iron*s, 2007 WL
 22 2027359 at *5-6. Particularly relevant to this case, the court noted that *Iron*s, like Petitioner in
 23 this case, had not yet served his minimum term. *Id.* at *5. Thus, the dicta from *Biggs* and its
 24 progeny do not preclude the Board from using circumstances of the commitment offense to deny
 25 parole, nor may this dicta be used to overturn a valid state court decision.

26 Accordingly, because Petitioner fails to prove that the state court decision denying parole
 27 in part based on the Governor's consideration of his commitment offense and criminal history is
 28 contrary to or an unreasonable application of clearly established Supreme Court law, his federal

1 petition must be denied.

2 **B. The Reasoned State Court Decision Upholding the Board's Parole Denial
Was a Reasonable Interpretation of the Facts.**

4 The second standard under AEDPA is that a state court habeas decision must be based on
5 a reasonable determination of the facts in light of the evidence presented. 28 U.S.C. §
6 2254(d)(2). AEDPA affords a great deal of deference to the state courts in this regard, stating
7 that “a determination of a factual issue made by a State court shall be presumed to be correct.”
8 28 U.S.C. § 2254(e)(1). Although Petitioner invites the Court to re-examine the facts of his case
9 and re-weigh the evidence considered by the Governor, AEDPA does not permit this degree of
10 judicial intrusion. So long as the state court’s reasoned decision was a reasonable determination
11 of the facts presented, Petitioner’s claim must fail.

12 Petitioner bears the burden of proving that the state court’s factual determinations were
13 objectively unreasonable. 28 U.S.C. § 2254(e)(1); *Juan H. v. Allen*, 408 F.3d 1262, 1270 (9th
14 Cir. 2005). Petitioner fails to meet this burden, as the state court reasonably found that some
15 evidence in the record supported the Governor’s findings that Petitioner’s parole release “could
16 pose an unreasonable risk to society or a threat to public safety, because of the violent nature of
17 the original offense, and the escalating pattern of petitioner’s criminal conduct before the murder,
18 as well as his multiple disciplinary infractions during his incarceration.” (Ex. 14 at 2-4.)

19 As to the murder offense, Petitioner cannot dispute that the state court reasonably
20 determined that there was some evidence of premeditation, that the murder was “committed in a
21 callous manner, and that “the Governor’s skepticism about petitioner’s expressed remorse and
22 acceptance of responsibility has at least some basis in fact.” (Ex. 14 at 3.) As to this last
23 consideration, the state court observed that although Petitioner claimed he shot Mr. Bustos in
24 self-defense, two witnesses had testified that they heard only one shot. (*Id.*) Furthermore,
25 Petitioner had “created the dangerous situation by forcing his way into Bustos’ residence armed
26 with a shotgun.” (*Id.*) Indeed, as the Governor noted, when asked by the Board in 2003 about
27 his self-defense claim and the way he would expect Mr. Bustos to have responded to Petitioner’s
28 intrusion into his home while armed with a shotgun, Petitioner acknowledged that he would not

1 have expected a different outcome. (Ex. 3 at 2.) Rather, Petitioner stated he would expect
 2 “[p]robably everything that happened.” (*Id.*; *see also* ex. 21 at 47-48.) Thus, Petitioner cannot
 3 show that the state court unreasonably construed the evidence regarding the murder offense and
 4 Petitioner’s remorse that was relied on by the Governor.

5 Petitioner also alleges that his criminal and substance abuse history should not have been
 6 considered given that, although admittedly reflecting some violent crime, he never seriously
 7 injured anyone and because he committed the robberies solely to support his drug addiction
 8 (which is now in institutional remission). (Pet. at 12-13.) The state court, however, indicated
 9 that under the some-evidence standard it could not grant relief even if it disagreed with the
 10 Governor’s decision (or if agreed with Petitioner’s perspective regarding his parole suitability),
 11 but rather was required to uphold the Governor’s decision “so long as it is supported by ‘some
 12 evidence.’” (Ex. 14 at 1-2.) The state court subsequently indicated that Petitioner had an
 13 extensive criminal record both as a juvenile and as an adult, as well as an extensive substance
 14 abuse history. (*Id.* at 3-4.)

15 While Petitioner may disagree with the weight the Governor attributed to these factors, he
 16 cannot demonstrate that the state court unreasonably interpreted the facts of his criminal and
 17 social history. Petitioner thus cannot demonstrate under AEDPA that the state court
 18 unreasonably upheld, as supported by some evidence, the Governor’s determination that
 19 Petitioner’s “criminal history, which began at a young age and include incidents of violent and
 20 assaultive behavior toward others, demonstrates his unwillingness to conform his behavior to the
 21 rules of society, and this weighs against his parole suitability at this time” (Ex. 2 at 2).

22 Similarly, Petitioner also cannot show that the state court unreasonably interpreted the
 23 facts regarding his substantial disciplinary history, consisting of twelve counseling memoranda
 24 for minor misconduct and seven rules violations for more serious misconduct (notably, two of
 25 the rules violations were for possession of a utility blade knife and inmate manufactured alcohol).
 26 (Ex. 3 at 1; ex. 8.) Hence, Petitioner cannot show that the court unreasonably applied the some-
 27 evidence standard in finding that “petitioner’s conduct while incarcerated was not discipline-free,
 28 which tends to support the Governor’s conclusion that petitioner could still be a risk to public

1 safety if released.” (Ex. 14 at 3.)

2 Finally, although not explicitly considered by the state court, its decision denying relief is
 3 further supported by Petitioner’s lack of a secured job offer as part of his parole plans. The
 4 Governor acknowledged that Petitioner has marketable skills. (Ex. 3 at 2.) But the Governor
 5 also reasonably determined that Petitioner’s lack of a secured job offer was significant, stating
 6 that “[h]aving a legitimate way to provide financial support for himself immediately upon release
 7 is essential to [Petitioner’s] success on parole.” (*Id.*) And while the applicable regulations do
 8 not list having a secure job offer in the illustrative parole criteria, the regulations not only permit
 9 the parole authority to consider whether the inmate has made “realistic plans for release,” but
 10 also specifically requires that the parole authority consider any “other information which bears on
 11 the prisoner’s suitability for release.” Cal. Code Regs. tit. 15, § 2402(b); *In re Honesto*, 130 Cal.
 12 App. 3d 81, 97 (2005) (holding that in finding an inmate unsuitable for parole, the parole
 13 authority may validly consider and rely on the inmate’s lacks a current employment offer). Thus,
 14 Petitioner’s lack of an employment offer also further demonstrates that the state court reasonably
 15 upheld the Governor’s parole denial.

16 In summary, the state court’s decision holding that some evidence supported the
 17 Governor’s parole denial is both supported by the record and a reasonable interpretation of the
 18 evidence presented. Petitioner therefore cannot prove that the state court’s factual determinations
 19 were unreasonable under AEDPA standards, and thus his federal petition must be denied.

20 **CONCLUSION**

21 Under AEDPA, the Court may grant a writ of habeas corpus only if it determines that the
 22 state court findings denying relief were contrary to, or an unreasonable application of, clearly
 23 established federal law, or that the decisions involved an unreasonable interpretation of the facts.
 24 Petitioner fails to prove that this is the case. First, he received all process due under *Greenholtz*,
 25 the only clearly established federal law specifically addressing the process due at parole
 26 consideration hearings. Second, due process does not preclude the Governor from relying on
 27 static factors to deny parole. Finally, Petitioner cannot show that the state court decision denying
 28 habeas relief was contrary to, or an unreasonable application of, clearly established Supreme

1 Court law, nor that the state court unreasonably determined the facts in light of the evidence
2 considered by the Governor. For these reasons, Respondent respectfully requests that the petition
3 for writ of habeas corpus be denied.

4 Dated: September 7, 2007

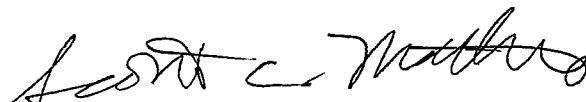
5 Respectfully submitted,

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Ans. to OSC; Mem. of P. & A.

Hernandez v. Schwarzenegger
C07-3427 PJH

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **HERNANDEZ, HECTOR v. ARNOLD SCHWARZENEGGER**

No.: **C07-3427 PJH**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 7, 2007, I served the attached

ANSWER TO THE ORDER TO SHOW CAUSE; MEMORANDUM OF POINTS AND AUTHORITIES

RESPONDENT'S INDEX OF EXHIBITS TO ANSWER

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Hector Hernandez
D-33689
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960
in pro per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 7, 2007, at San Francisco, California.

J. Palomino
Declarant


Signature